



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
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IN THE MATTER OF THE)	<u>ORDER</u>
IMPLEMENTATION OF THE FEDERAL)	
COMMUNICATIONS COMMISSIONS')	DOCKET NO. TO03090705
TRIENNIAL REVIEW ORDER)	

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Order pertains to a civil action pending in U.S. District Court against the Board of Public Utilities and the individual Board Commissioners in their official capacities. Before the Board is a recommendation by Board Staff that the aforementioned litigation be settled amicably by entering into a Stipulation and Agreement with Verizon New Jersey, Inc., as more fully set forth below.

BACKGROUND

On August 21, 2003, the Federal Communications Commission ("FCC") issued its Triennial Review Order ("TRO")¹, which adopted new and revised rules aimed at promoting local telephone and broadband competition. In these rules, individual states were charged with implementing vital aspects of the TRO related to unbundling of the incumbent local exchange carrier's ("ILEC") network pursuant to 47 U.S.C. § 251 (c)(3).

The TRO, which became effective October 2, 2003, required each state commission to conduct a detailed analysis to determine whether competitive local exchange carriers ("CLECs") are impaired from providing telecommunications services to prospective customers without access to specific unbundled network elements ("UNEs"). The TRO also contained a presumptive nationwide finding that CLECs were no longer impaired without access to ILEC switching serving DS1 enterprise customers, which were defined by the FCC as those customers for which it is economically feasible for a CLEC to provide voice service with its own switch using a DS1 or above capacity loop.²

¹ *I/M/O Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("TRO").

² TRO, ¶451, fn. 1376

The TRO further set forth the FCC's presumptive nationwide determination that CLECs were impaired from providing telecommunications services without access to ILEC switches serving mass market customers. The FCC defined this customer class as that which can only be economically served via analog DS0 loops.³ The states were authorized to rebut the FCC's nationwide impairment presumption regarding mass-market switching by determining, on a market-by-market, granular basis, whether lack of access to switches serving mass-market customers impaired the provision of communication services.⁴ As part of this analysis, the states were required to establish a maximum number of DS0 loops for each geographic market that requesting CLECs could serve through unbundled switching when serving multi-line end users at a single location.⁵ As an interim measure designed to preserve the *status quo* in given markets, the FCC also retained an exception to its mass market switching unbundling presumption pertaining to switching serving CLEC customers with 4 or more DS0 lines density zone 1 of the top fifty metropolitan statistical areas ("MSAs") in the United States.⁶

On March 2, 2004, the U.S. Circuit Court of Appeals for the District of Columbia Circuit issued its opinion in the case entitled United States Telecom Association v. F.C.C.⁷ ("*USTA II*") in which it vacated significant portions of the FCC's TRO, including the FCC's subdelegation to the states of decision-making authority over impairment decisions. The Court's mandate was stayed until June 16, 2004.

On May 18, 2004, Verizon New Jersey, Inc. ("VNJ") sent at least two written notices to various CLECs in New Jersey. One notice stated that, pursuant to the TRO and the FCC's rules promulgated pursuant thereto, VNJ was no longer required to provide unbundled enterprise switching to CLECs, which it defined as switching used to supply customers using DS1 or above capacity loops. The second notice stated that, pursuant to the same FCC regulations, VNJ was no longer required to unbundle switches serving customers who are subject to the so-called "four line carve-out rule." The two notices stated, *inter alia*, Verizon's intention to discontinue providing unbundled access enterprise switching and/or switching subject to the four-line carve-out rule as of August 22, 2004.

On June 1, 2004, in response to a request for comment, the Board received filings from 24 CLECs, the RPA and VNJ regarding the state of the law in light of *USTA II*. The CLECs generally argued that VNJ had an affirmative obligation to continue to provide UNEs at current rates, irrespective of the expiration of the D.C. Circuit's self-imposed stay. In order to preserve the *status quo*, the RPA and several CLECs petitioned the Board to issue an Order directing VNJ to continue to provide all UNEs and UNE combinations until a final resolution was achieved.

In its response, VNJ indicated to the Board that telecommunications services to CLEC customers would not be unduly disrupted, consistent with the mandate of the D.C. Circuit in *USTA II*. Verizon also stated that it would continue to provide services to the

³ TRO ¶459

⁴ TRO ¶493-494

⁵ TRO ¶497

⁶ TRO ¶497

⁷ United States Telecom Association v. F.C.C., 359 F.3d 554 (D.C. Circuit 2004)

embedded base of CLEC customers in accordance with federal law and interconnection agreements between competitors. It further stated that if CLECs did not opt for commercially negotiated arrangements, VNJ would give them ample notice after issuance of the mandate before transitioning the CLECs to service at resale rates (or for high capacity transport and loops, to special access rates). VNJ stated that it would give CLECs 90 days after notice of the issuance of the D.C. Circuit's mandate, and would continue to accept CLEC orders during those 90 days.

Based on its finding that the scope of the *USTA II* decision created uncertainty with respect to the rights and responsibilities of VNJ upon issuance of the Court's mandate, the Board on June 18, 2004 ordered that unless the parties agreed to modify their interconnection agreements ("ICAs"), VNJ must continue the *status quo* with respect to providing UNEs, combinations thereof, and the UNE Platform ("UNE-P") to CLECs with which it had executed Board approved ICAs for at least 90 days from the issuance of the D.C. Circuit's mandate.⁸ The Board further ordered that any modifications to the rates, terms, or conditions contained in approved ICAs during or after the 90-day period must be approved by the Board, consistent with applicable law, and would be subject to such final orders as the Board may thereafter issue.⁹ The Board stated that it would continue to monitor developments related to the issues discussed in its Order and take further action, including the issuance of further orders as it may determine to be necessary, to ensure that all parties' rights are preserved and that any actions taken comport with applicable law.¹⁰

On July 20, 2004 AT&T Communications of N.J., L.P., TCG Delaware Valley, Inc. and Teleport Communications of New York (collectively, "AT&T") filed a Petition for Clarification of the Board's Standstill Order, in response to VNJ's May 18 notices. AT&T, supported by the Division of the Ratepayer Advocate ("RPA") and various CLECs, argued that the Board's June 18 Standstill Order precluded VNJ from discontinuing its provision of enterprise switching and switching subject to the four-line carve-out rule to requesting CLECs, since these unilateral actions by VNJ would change the *status quo* with respect to the provision of UNEs in New Jersey. The moving parties requested that the Board clarify that VNJ could not eliminate unbundled access to switching for enterprise and 4-lines-and-above customers on August 22, 2004.

On August 20, 2004, based on its review of the submissions of the parties and controlling law, the Board found that, pursuant to its June 18 Standstill Order, VNJ could not cease to provide unbundled switching for any CLEC allegedly subject to the four-line carve-out rule on August 22, 2004 if such switching had heretofore been provided, for a minimum of 90 days. The Board reserved the right to determine whether and how to exercise further review of proposed changes to ICAs, in accordance with its Standstill Order and relevant interim FCC rules.¹¹

⁸ *I/M/O the Implementation of the Federal Communication Commission's Triennial Review Order*, Order, Docket No. TO03090705, June 18, 2004 ("Standstill Order"), p. 3.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 3-4.

¹¹ *I/M/O the Implementation of the Federal Communication Commission's Triennial Review Order*, Order, BPU Docket No. TO03090705, August 20, 2004 ("Clarification Order").

Following the Board's issuance of its Clarification Order on August 20, 2004, the FCC issued its Order and Notice of Proposed Rulemaking ("Interim Order"),¹² in which it set forth interim rules defining the ILECs' UNE obligations in the period prior to the promulgation of new rules pursuant to the *USTA II* mandate. Among other things, the FCC required that ILECs continue to provide unbundled access to switching, enterprise market loops and dedicated transport on an interim basis under the same rates, terms and conditions that applied under their ICAs as of June 15, 2004.¹³ The FCC required that these rates, terms and conditions should remain in place until either the effective date of the final unbundling rules promulgated by the FCC or a date six months after the publication of the Interim Order in the Federal registry, whichever is earlier. The FCC made no mention in its Interim Order of the four-line carve-out rule or the appropriate demarcation point, in New Jersey or any other market, between mass-market and enterprise customers.

Following the issuance of the FCC Interim Order, VNJ filed a petition for reconsideration of the Board's August 20, 2004 Clarification Order. Opposition filings were submitted by several CLECs and the RPA. After careful consideration of the filings and controlling law, the Board denied Verizon's motion. The Board found that it was not obligated to reconsider its prior orders based on any FCC directive allegedly contained in its Interim Order, and ordered Verizon to continue to provide unbundled switching to CLEC customers using four or more DS0 lines.

On September 14, 2004, VNJ filed a Complaint in U.S. District Court under the Supremacy Clause of the United States Constitution for a declaration that the Board had acted contrary to Telecommunications Act of 1996 by issuing the aforementioned Standstill and Clarification Orders, and that the Board had violated what VNJ referred to as the FCC's Four Line Carve Out rule. The Board filed an Answer and a motion to stay the matter before the district court and refer it to the FCC for resolution, pursuant to the doctrine of primary jurisdiction. By Order dated November 23, 2004, the court granted AT&T and the RPA leave to intervene in this matter.

On March 11, 2005 the FCC's Triennial Review Remand Order ("TRRO")¹⁴ became effective. This Order articulated and explained the FCC's new rules implementing the interconnection obligations of ILECs, as generally set forth in the Telecommunications Act of 1996. In the TRRO, the FCC specifically found, among other things, that CLECs are not impaired without unbundled access to ILEC mass market switching.¹⁵ The TRRO also stated that ILECs need not supply new orders for UNE-P or other discontinued UNEs as of March 11, 2005, the effective date of the TRRO, and further provided for a transition period pertaining to the embedded base of discontinued UNE customers.¹⁶

¹² *I/M/O Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, FCC 04-179, (August 20, 2004) ("Interim Order").

¹³ *Interim Order*, ¶1.

¹⁴ *Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 04-313, 01-338 Order on Remand, FCC 04-290 (Released February 4, 2005) ("Triennial Review Remand Order" or "TRRO").

¹⁵ TRRO ¶199

¹⁶ TRRO ¶¶66, 146, 227, 235

On February 10, 2005, VNJ posted an industry letter on its website asserting that the FCC regulations issued on February 4, 2005 provide that CLECs are not impaired without access to UNE-P combinations. VNJ also stated its belief that CLECs were no longer permitted to submit orders for completion on or after March 11, 2005 if such orders were for "Discontinued Facilities" such as UNE-P.

On February 28, 2005, MCI filed an emergent motion for a Board Order directing VNJ to accept new UNE-P orders in accordance with the terms of the parties' interconnection agreement, pending renegotiation of contract terms in accordance with the TRRO. On March 7, a group of CLECs also filed a petition to intervene in MCI's motion and comments in support thereof. The petitioning CLECs joined in MCI's request for relief from VNJ's intended shut-off of new UNE-P orders, and requested that the Board direct VNJ to engage in negotiations with respect to the all discontinued UNEs and UNE combinations, not just mass market circuit switching and UNE-P.¹⁷ VNJ, AT&T and the RPA also filed responses to MCI's motion on March 7, 2005.

The petitioning CLECs all contended that their interconnection agreements with VNJ contained provisions requiring changes in ILEC unbundling requirements to be negotiated in good faith with the CLEC. They also claimed that the TRRO required changes in unbundling law to be implemented through such negotiations, and that ILECs such as VNJ were therefore not permitted to unilaterally cease complying with new CLEC orders for discontinued UNEs. AT&T and the RPA argued that the CLEC's interpretation of both the TRRO and their interconnection agreements was correct, and that VNJ should be enjoined from implementing the discontinuation of affected UNEs on March 11.

The Board carefully considered the express language of the TRRO and the FCC's new regulations in its review of these motions. In a written Order issued on March 24, 2005, it concluded that, while the TRRO was susceptible to varying interpretations, the Board was not empowered to require VNJ to continue supplying new orders for discontinued UNE arrangements after March 11, 2005. The Board further acknowledged the FCC's express directive permitting ILECs to cease providing unbundled access to certain network elements, including switching, as of March 11, 2006. The FCC specifically created a one-year transition period for the phasing out of unbundled switching as a stand-alone UNE or as part of a combination of UNEs.

Following the issuance of the Board's March 24 Order, counsel for the Board and VNJ entered into settlement negotiations pertaining to VNJ's pending federal lawsuit against the Board. A tentative settlement document ("Stipulation and Agreement" or "Agreement") was agreed to by VNJ and Board Staff in late May, 2005. Staff represented it would recommend the Agreement to the Board, subject to comments by interested parties.

¹⁷ The TRRO requires continued unbundling of high-capacity (DS1 and DS3) and dark-fiber loops and dedicated transport, but only for CLEC customers served by wire centers containing less than a maximum number of business lines and/or fiber-based collocators. The prescribed thresholds vary according to the type of UNE sought. Loops and transport not eligible under this wire center-based formula need not be unbundled. Therefore, the characteristics of each wire center are crucial in determining whether particular network elements have to be unbundled. The FCC also indicated that ILECs need not service new CLEC orders for discontinued loop and transport UNEs after the effective date of the TRRO. TRRO ¶¶66, 146.

The Agreement was circulated to CLECs in New Jersey on June 3, 2005 for comment. Only AT&T responded. AT&T opposes the Agreement and asserts that it violates the TRRO, which sets forth a one-year transition period for the elimination of UNE-P (the UNE combination of which switching is an integral part). AT&T also asserts that it is contractually entitled to receive the UNE platform, including 4-or-more line switching, until March 11, 2006, pursuant to its interconnection agreement with VNJ.

AT&T further contends that any settlement of VNJ's suit should minimize AT&T's exposure to unnecessary costs and administrative burdens arising from the imposition of the four-line carve-out. Specifically, AT&T recommends an imposition date not before January 1, 2006, to give AT&T more time to complete the automation of the operations support systems that serve AT&T's business customers. Moreover, AT&T recommends that, as a means of partially defraying the adverse affects of the four-line carve-out, the Board should direct that VNJ waive all non-recurring charges associated with conversion requests and to waive the incremental increase in monthly recurring rates for the time between November 8, 2005 and March 11, 2006.

On June 20, 2005, VNJ submitted written comments in response to AT&T's objections. VNJ disagrees that AT&T enjoys a contractual right to four-or-more line switching, noting that AT&T has been on notice since May 18, 2004 of VNJ's intention to cease providing such UNEs. VNJ also rejects AT&T's recommendations regarding defrayment of conversion costs, stating that they are not based in law or fact and are self-serving.

This matter was placed on the Board's June 22, 2005 agenda with a recommendation from Staff that the Board and the individual Commissioners in their official capacities authorize counsel to execute the Agreement on their behalf.

DISCUSSION

After careful consideration of both AT&T's and VNJ's comments, the Board accepts the Stipulation and Agreement as currently recommended by Staff, and is not willing to seek amendment thereof in accordance with AT&T's recommendations. The Board fully agrees with AT&T that the position it has taken regarding the four-line carve-out is in full conformance with controlling federal law, rules and orders. The Board stands ready to defend that position should the need arise in the future. However, as is common in administrative orders encompassing a large and diverse array of complex policy determinations, both the TRO and the TRRO contain numerous ambiguities. The resolution of these ambiguities can and has split reviewing courts, as well as state utility commissions, asked to decide the same issue. Under these circumstances, the Board believes that certainty and predictability in this matter is a better course than continued litigation. Settlement of this suit is in conformance with the strong public policy in this State favoring amicable settlement of litigation, based on the laudable fact that settlements permit parties to resolve disputes according to mutually acceptable terms rather than exposing themselves to the uncertainties of litigation, saves litigation expenses, and furthers the administration of the courts by conserving judicial resources. See Ocean Cty. Chapter Inc. of the Izaak Walton League of America v. D.E.P., 303 N.J. Super. 1 (App. Div. 1997); Dep't of Public Advocate v. NJ Board of Public Utilities, 206 N.J. Super. 523 (App. Div. 1985).

With respect to AT&T's assertion that the Agreement violates the FCC's one-year transition period for unbundled mass market switching, the Board acknowledges that such a transition period has been established. However, this acknowledgment (and AT&T's comment) begs the question at the heart of the current litigation: whether four-or-more DS0 line switching should be included in the embedded base of customers for whom the transition period is intended. We believe that the answer to this question, while perhaps subject to ambiguity, is probably yes. VNJ obviously disagrees with the Board on this point. The Board has ordered such switching to be unbundled in New Jersey far longer than almost any other state in Verizon's service territory, and almost fifteen months longer than VNJ itself intended. Under the terms of the Agreement, AT&T, other CLECs and, most importantly, the state of competition itself have benefited from the Board's actions. However, for the reasons mentioned above, we now believe that settlement of this litigation is prudent, fair and fully in the interests of the citizens of this State.

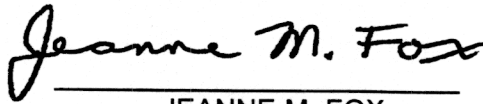
We also do not agree with AT&T that the terms of this Agreement violate its interconnection agreement with VNJ. According to AT&T, the contractual provision in question requires the parties to negotiate the imposition of any changes in legally binding authority that affect the terms of the contract (e.g. the provision of UNE-P to four-or-more line customers). By entering into this Agreement, the Board has committed to lifting its restriction on the imposition of the so-called four-line carve-out rule in New Jersey as of November 8, 2005. It has not made any comment, ruling, or stipulation regarding the terms of individual interconnection agreements between VNJ and any CLEC, including AT&T. Thus, to the extent AT&T deems itself contractually authorized to enter into negotiations with VNJ before November 8, 2005 to implement the "change of law" set forth in the Agreement, nothing therein prevents it from doing so. We observe that the approximately four and one half months between now and the imposition of the new requirement should afford any CLEC ample time to negotiate the required amendments to its contract. The Board is available to help resolve, on an expedited basis if necessary, any disagreements that arise from this process.

For the foregoing reasons, we **HEREBY FIND** that the portions of our previous Standstill and Clarification Orders requiring VNJ to continue providing unbundled access to switching for CLEC customers using four or more DS0 lines in density zone 1 of the Philadelphia-Camden-Wilmington and New York-Newark-Edison MSAs on an indefinite basis have now been rendered moot by the FCC's TRRO. Furthermore, we **HEREBY APPROVE** the attached Stipulation and Agreement and direct counsel to execute said document on our behalf.

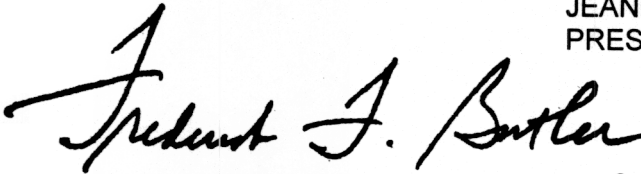
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BOARD OF PUBLIC UTILITIES

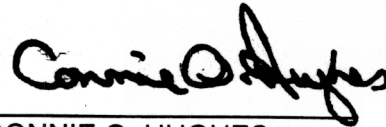
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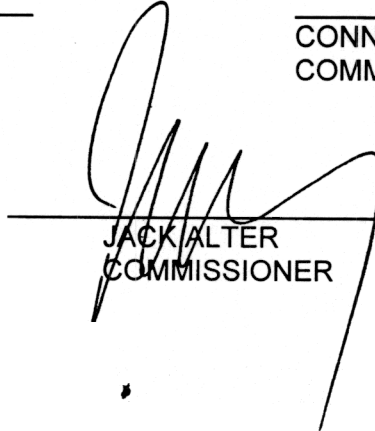
JEANNE M. FOX
PRESIDENT



FREDERICK F. BUTLER
COMMISSIONER

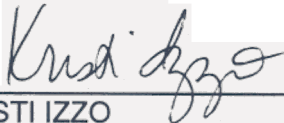


CONNIE O. HUGHES
COMMISSIONER



JACK ALTER
COMMISSIONER

ATTEST:



KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

